IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. [redacted] 79

JOHN G. GEITZ, JR.,

Respondent,

7411

vs.

CITY OF HARVEY,
a municipal corporation,

Petitioner.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 1038

JOHN G. GETZ, JR.,

Respondent,

7411 *vs.*

CITY OF HARVEY,
a municipal corporation,

Petitioner.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

FOREWORD.

MAY IT PLEASE THE COURT:

The petition for writ of certiorari filed by the City of Harvey, a municipal corporation in the County of Cook and State of Illinois, and its officials, relates to the appeal

of *John G. Getz* v. *City of Harvey, et al.,* No. 7411, in the Circuit Court of Appeals for the Seventh Circuit.

Petitioners have limited their appeal to two questions: (1) Whether John G. Getz, Jr., respondent, had notice of the alleged agreement entered into between the City of Harvey and Roy D. O'Brien; and (2) Whether or not John G. Getz, Jr. was bound by latent equities, if any, in favor of the city as against Roy D. O'Brien.

Jurisdiction in this court is claimed on the ground that the decision of the Circuit Court of Appeals for the Seventh Circuit is contrary to local decisions in similar questions. We submit that the cases of the Illinois Supreme Court and the Illinois Appellate Court which the Circuit Court of Appeals cited relating to the two questions now raised by petitioners are specifically applicable to the facts in the instant matter and are the established law of the State of Illinois.

Counsel for petitioners has not set forth any evidence to contradict the facts as set forth in the opinion of the Circuit Court of Appeals. The statement of the facts and the law as set forth in the opinion appear in the transcript of the record at pages 932 to 934, inclusive.

In view of the fact that the issues decided by the Circuit Court of Appeals are in strict conformity with the decisions of the Illinois Supreme and Appellate Courts, petitioners seek by certiorari to review and discuss only specific facts to the exclusion of all the facts as established by the evidence. Under such circumstances, this court has held:

> "We do not grant a certiorari to review evidence and discuss specific facts."
>
> *U. S.* v. *Johnston,* 45 S. Ct. Rep. 496, 497; 268 U. S. 220.

"The writ of certiorari was not granted to review the particular facts, but to pass upon the question of principle."

Crowell v. *Benson,* 52 S. Ct. Rep. 285, 298; 285 U. S. 22, 65.

"The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that 80 per cent. of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

Magnum Import Co. v. *Coty,* 43 S. Ct. Rep. 531, 532; 262 U. S. 159, 163.

SUMMARY OF ARGUMENT.

I.

Respondent's reply to petitioners' proposition:

"Respondent, John G. Getz, Jr., is not a bona fide purchaser for value of the $243,000 par value certificates of indebtedness of the City of Harvey, the subject matter in this suit."

1. Petitioners' own evidence established that C. S. Mott purchased the 243,000 water fund certificates of indebtedness by paying $243,000 in cash.
   (a) Mr. Getz purchased the certificates from Mr. Mott and gave his note for the full amount and deposited the certificates as collateral security for its payment.
   (b) The statement made by counsel for petitioners that Mr. Getz testified that his note was not a good note failed to state all that Mr. Getz said. Mr. Getz stated that he could not issue a note of that magnitude unless it was secured by good collateral and in his opinion the water fund certificates which were pledged as collateral were good.
   (c) C. S. Mott having paid full value for said water fund certificates it is immaterial to the petitioners what the transaction was between Mr. Mott and Mr. Getz.
2. Petitioners contend that the water fund certificates, being non-negotiable instruments, respondent was under duty to inquire of the maker the reason for the default.

(a) The record in this case establishes that the default in the payment of principal and interest on the water fund certificates was due to the diversion of those funds by the City officials for other purposes.

(b) The accounting in this suit first established those facts.

3. Respondent did not have any notice or knowledge of the alleged agreement between O'Brien and the City of Harvey.

(a) Under Section 22 of the Commission Form of Government Act it is mandatory that every motion, resolution and ordinance shall be reduced to writing and read before vote is taken, and upon every vote the "yeas" and "nays" shall be called and recorded.

(b) Under Section 33 of the Commission Form of Government Act the making or authorizing of any contract must be in writing, must remain on file with the city or village clerk for public inspection complete in form in which it is finally passed, at least one week before the final passage or adoption thereof.

(c) The Supreme Court of the State of Illinois has construed the foregoing sections to be mandatory and unless complied with the agreement is invalid.

4. Neither the alleged agreement dated April 20, 1936, nor the alleged agreement dated September 8, 1936, were acted upon by the city council as required by Sections 22 and 33 of the Commission Form of Government Act.

(a) A secret meeting was held on April 21, 1936, in a small room off the city clerk's office.

(b) The city clerk testified that he had always kept minutes of the proceedings of the city council except the alleged meeting of April 21, 1936. No meeting was called to consider the proposal of September 8, 1936.

(c) Upon being questioned by the master why no record was made of the meeting of April 21, 1936, the city clerk testified that he was instructed by the mayor not to keep the minutes because the refinancing was something they wanted to keep as quiet as possible and not give too much publicity because "we were trying to get the certificates in at as low a figure as possible."

(d) In view of the fact that no records were kept of the O'Brien transactions obviously Mr. Getz could not have obtained knowledge or notice from the records either by inspection or by constructive notice.

5. The City of Harvey has no power or right to purchase outstanding water fund certificates. This has been clearly established by the Illinois Supreme Court decisions.

6. The Circuit Court of Appeals found that Mr. Getz had no knowledge of any dealings between the City of Harvey or O'Brien and Allyn & Company; that if the City of Harvey could claim any equity as a defense, it would come within the well-established rule as laid down by the Illinois Supreme and Appellate Courts to the effect that latent equities between intermediate parties cannot be set up as against a purchaser for value after maturity.

II.

Respondent's reply to petitioners' proposition:

"There was a binding refunding contract between the City of Harvey and A. C. Allyn & Company."

1. Counsel for petitioners' contention that the O'Brien contract was dependent upon O'Brien's ability to acquire sufficient certificates to "declare his plan workable" and was not dependent upon his ability to acquire all of the outstanding certificates is fallacious in that unless Mr. O'Brien was able to acquire all of the outstanding certificates it would have been impossible for him to declare the plan workable.

   (a) The petitioners' own evidence conclusively proved from the records of A. C. Allyn & Company and Stifel, Nicolaus & Company that $222,000 par value of water fund certificates was the total number that A. C. Allyn & Company had ever been able to acquire. The total number of certificates to be refunded was $452,000.

   (b) Mr. O'Brien testified that it was impossible to acquire the balance needed to refund the two issues.

2. The Circuit Court of Appeals' decision fully conforms with the Illinois law.

ARGUMENT.

I.

Respondent's reply to petitioners' proposition:

"Respondent, John G. Getz, Jr., is not a bona fide purchaser for value of the $243,000 par value certificates of indebtedness of the City of Harvey, the subject matter in this suit."

The petitioners' own evidence established that C. S. Mott purchased the $243,000 water fund certificates of indebtedness by paying $243,000 in cash. The Circuit Court, in its opinion, referred to the various trades in these securities among A. C. Allyn & Company, Stifel, Nicolaus & Company, and others between October 15, 1936, and November 15, 1937, at prices ranging from 70c to par. "Eventually on August 18, 1937, Stifel, Nicolaus & Company sold to one Mott in Detroit, Michigan, $220,000 and on November 17, 1937, $21,000 in certificates, all at par. Mott paid cash and entered into no arrangement for repurchase by the seller. The securities were sold to him without recourse and for cash. Thereafter Mott sold them to plaintiff at par. Plaintiff executed his note for the full amount and deposited the certificates as collateral security for its payment." (Tr. 932)

The statement made by counsel that Mr. Getz testified that his note in that amount was not a good note failed to state all that Mr. Getz said. What Mr. Getz stated in response to a question by Mr. Dowdle is as follows:

> "I would say freely to you that my note in that amount is not a good note except as the value of the things I purchased with that are good, which in my

opinion they are. * * * But, if what you are getting at is that the amount of money that I may have earned doesn't warrant my issuing a note of this magnitude, I say that's perfectly true and admitted, except in so far as what I purchased with the note is the value." (Tr. 218)

In so far as petitioners are concerned, whether the note which Mr. Getz gave to C. S. Mott is good or not is immaterial. The fact still remains that Mr. Mott paid $243,000 in cash for the water fund certificates and in turn sold them to Mr. Getz.

"* * * if any intermediate holder between the defendant and the plaintiff gave value for the bill, that intervening consideration will sustain the plaintiff's title."

Inhabitants of Montclair v. *Ramsdell,* 2 S. Ct. Rep. 391, 401; 107 U. S. 147, 156.

The second point argued by petitioners is to the effect that the water fund certificates being non-negotiable instruments, respondent is under duty to inquire of the maker the reason for the default. Obviously, from the record in this case, the reason for the default in payment of principal and interest of the water fund certificates was because the officials of the City of Harvey diverted the funds for other purposes. Counsel, however, states that if respondent had inquired into the reason for the default he would have been informed of petitioners' claims against A. C. Allyn & Company.

In answer to this contention it is necessary to point out to this court, as was pointed out in our briefs to the Circuit Court of Appeals, that the City of Harvey is organized under what is known as the Commission Form of Government Act of the State of Illinois. Section 22 of this Act is as follows:

"Every such city or village shall be governed by a council, consisting of the mayor and four commis-

sioners, as provided in this Act, each of whom shall have the right to vote on all questions coming before the council. Three members of the council shall constitute a quorum, and the affirmative vote of three members shall be necessary to adopt any motion, resolution or ordinance, or pass any measure, unless a greater number is provided for by this Act.

"Upon every vote the 'yeas' and 'nays' shall be called *and recorded,* and every motion, resolution or ordinance *shall be reduced to writing* and read before a vote is taken thereon, and all the commissioners, including the mayor, present at any meeting shall vote thereon." (Italics ours.)

Chap. 24, Par. 286, p. 397, Ill. Rev. Stats. 1937.

Section 33 of the Commission Form of Government Act specifically prescribes the following:

"* * * Every ordinance or resolution appropriating any money, * * * *or making or authorizing the making of any contract* * * * *shall remain on file with the city or village clerk for public inspection, complete in form in which it is finally passed, at least one week before the final passage or adoption thereof.*" (Italics ours.)

Chap. 24, Par. 298, p. 399, Ill. Rev. Stats. 1937.

The foregoing sections have been construed by the Illinois Supreme Court to be mandatory and that if any action is taken or any contract is entered into which does not strictly comply with these provisions the same is null and void.

"Appellant objected to the confirmation of the assessment on the ground that the ordinance is void for the reason that it was not on file with the city clerk for public inspection for one week before its passage. * * * One of the necessary steps prescribed by the Act regulating the passage of ordinances in the city of Ottawa was omitted, and therefore the ordinance was not legally passed. * * * The objection challenging the validity of the ordinance should have been sustained."

City of Ottawa v. *Hulse,* 317 Ill. 276, 277.

In the case of *City of Zion* v. *Christian Catholic Church,* 286 Ill. App. 449, the court held a lease invalid because the city council had not let it lie over a week as required by Section 33.

> "* * * It therefore appears from this record that at the final meeting of the city council prior to the new council assuming office, the proposed form of lease agreement was presented by appellants and acted upon by the council contrary to sec. 33 of the act. This section was before the Supreme Court in the case of *City of Ottawa* v. *Hulse,* 317 Ill. 276. It was there held that the provision of said section requiring any such contract, etc., to remain on file with the city or village clerk for public inspection, at least one week before the final passage or adoption, *was mandatory and that a compliance with such provision was necessary to the validity of any ordinance or official act of the council coming within its terms.* We are of the opinion that what was said in that case is controlling in this case." (Italics ours.)
>
> *City of Zion* v. *Christian Catholic Church,* 286 Ill. App. 449, 451, 452.

We have set forth the foregoing sections of the Commission Form of Government Act for the reason that the alleged agreement between the City of Harvey and Roy D. O'Brien was never acted upon by the city council as required by those particular sections. The evidence established that there was an alleged meeting held on the 21st day of April, 1936, called for the purpose of considering the O'Brien proposal dated April 20, 1936. This was a special meeting held in a small room off the city clerk's office. No notice with reference to this special meeting had been sent out in writing; the officers were called by telephone on the same day as the meeting was held. (Tr. 435) In answer to the following questions Mr. Norton, the City Clerk of the City of Harvey, testified as follows:

"Q. Now, as city clerk, you always keep minutes

of the proceedings, do you not? A. Not always. I did not in this case.

Q. How many other cases besides this? A. None to my knowledge. This is unusual.

Q. This is unusual? A. Unusual case. (Tr. 435)

* * * *

Q. And after this meeting here, you made no memorandum, did you, regarding what was done there, in writing? A.. No, sir." (Tr. 437)

In replies to questions put by the Master, Mr. Norton stated the following:

"Q. Can you explain why it was that no record was made at that time of that proceeding? A. Yes, sir.

Q. I would like to have you do so. A. I was instructed by Mr. Bruggeman [the mayor] not to keep the minutes, because this refinancing was something that they wanted to keep as quiet as possible, and not give too much publicity because we were trying to get the certificates in at as low a figure as possible." (Tr. 437)

The foregoing testimony, which was corroborated by the mayor and the commissioners, proved that no records of the alleged transactions between Roy D. O'Brien and the City of Harvey were ever made. Consequently, the alleged agreement with Roy D. O'Brien dated April 20, 1936, was never made part of the records of the City of Harvey as required by Sections 22 and 33 of the Commission Form of Government Act, and therefore was not only a matter *not* of record but also was not a legal contract.

It has long been the rule in Illinois that a city or village must keep a record of its proceedings; that such a record, which is the only source of evidence by which official action can be shown, which does not show any action shows that none was taken. (*Village of Bellwood* v. *Galt,* 321 Ill. 504, 508, 509; *Roemheld* v. *Chicago,* 231 Ill. 467, 470; *Arnold* v. *Village of Ina,* 244 Ill. App. 239, 240.)

It is apparent that if Mr. Getz had sought to inquire into the alleged transactions between Roy D. O'Brien and the officials of the City of Harvey the records, which would have been the only available source by which such transactions could be established, would have shown nothing regarding this matter. The entire transaction, as testified to by the city clerk, was to have been kept secret. Furthermore, the city clerk testified that "We were trying to get the certificates in at as low a figure as possible." This indicates the motive that actuated the secrecy of this transaction. The object, as disclosed by petitioners' theory, was to purchase the water fund certificates at a low figure. That the City of Harvey had no such power or right is equally well established under the decisions of the Illinois Supreme Court. (*Chicago* v. *Brede,* 218 Ill. 528, 536; *Berman* v. *Board of Education,* 360 Ill. 535, 541.)

The alleged agreement with O'Brien dated September 8, 1936, was never acted upon by the city council as required by Sections 22 and 33 of the Commission Form of Government Act or in any manner whatsoever. By its terms it expired in 90 days from September 8, 1936. As far as the evidence disclosed the agreement expired under its own terms.

The Circuit Court of Appeals, in considering these two agreements, found that Mr. Getz had no knowledge of any dealings between the City of Harvey and O'Brien or Allyn & Company. (Tr. 932) Notwithstanding this, the court pointed out that even were Mr. Getz bound by the so-called proposal and negotiations between O'Brien and Allyn & Company on the one hand, and the city on the other, upon analysis of those transactions it was apparent that no equity arose in favor of the city. However, even if the City of Harvey were to claim any equity as a de-

fense, it would come within the rule cited by the Circuit Court of Appeals to the effect that it was a latent equity and one that would not be available as a defense against the respondent herein. The case of *Freiner* v. *Lane,* 302 Ill. App. 248, is clearly in point. The facts in that case bear a close analogy to the facts in the case at bar. In that case the court applied the rule laid down in the case of *Silverman* v. *Bullock,* 98 Ill. 11. On page 256 the court said:

> "It is well settled that latent equities between intermediate parties cannot be set up as against a purchaser after maturity. *Wolford* v. *Rusk,* 145 Ill. App. 405, *Silverman* v. *Bullock,* 98 Ill. 11."
>
> *Freiner* v. *Lane,* 302 Ill. App. 248, 256.

Petition for leave to appeal to the Supreme Court was denied in the *Freiner case* so that the same can be treated as final (302 Ill. App. xv). The Circuit Court of Appeals correctly followed the Illinois law.

II.

Respondent's reply to petitioners' proposition:

"There was a binding refunding contract between the City of Harvey and A. C. Allyn & Company."

Counsel for petitioners under this point states that the court overlooked the evidence in the record that shows that the O'Brien contract was dependent upon his ability to acquire sufficient certificates to " 'declare his plan workable' and was not dependent upon his ability to acquire all of the outstanding certificates." The fallacy of this argument is that unless Mr. O'Brien was able to acquire all of the outstanding certificates it would be impossible for him to declare the plan workable. Counsel also states that the court misapprehended the evidence

and fails to note that in the contract of September 8, 1936, between the City of Harvey and Roy D. O'Brien it is provided that the time limit of 90 days might be extended, with the consent of the mayor and chairman of Finance Committee of the City of Harvey. As we have heretofore pointed out, this contract was never legally authorized and there was no evidence that the contract was extended. Mr. O'Brien testified that it was never formally extended. (Tr. 362)

Counsel also complains about other acts which took place after September 8, 1936. None of these acts disprove the fact that the total number of water fund certificates that Mr. O'Brien was able to procure control over were $243,000. (Tr. 362) The total certificates to be refunded were $452,000. The balance of these bonds, Mr. O'Brien testified, were impossible to obtain. (Tr. 363) Notwithstanding counsel's statement to the effect that the court overlooks the evidence of the record that $429,000 or $430,000 par value outstanding certificates of indebtedness were in the possession or under the control of A. C. Allyn & Company (Tr. 444), the fact is that the evidence conclusively shows the total number of certificates in the possession and control of A. C. Allyn & Company was, as proved by the City of Harvey, and as pointed out by the court in its decision (Tr. 932), to have been only $222,000. The fact that the Public Service Company had $129,000 in water fund certificates, the Reconstruction Finance Corporation others, and that some were in Joliet is not proof they were in the possession and control of A. C. Allyn & Company. Counsel for the City of Harvey introduced in evidence the books and records of A. C. Allyn & Company and Stifel, Nicolaus & Company. Those records conclusively prove that $222,000 par value water fund certificates were the total number that A. C. Allyn & Company had ever been able to acquire.

CONCLUSION.

Respondent respectfully submits that the petition for certiorari in this matter seeks only a rehearing of certain specific facts relating to the Roy D. O'Brien transaction. The facts involved in this matter have been carefully considered by the Circuit Court of Appeals, and the court has properly applied the law of the State of Illinois to those facts.

Wherefore, respondent respectfully prays that the application for the writ of certiorari be denied.

Respectfully submitted,

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